

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOE ROME)	
Claimant)	
VS.)	
)	Docket No. 170,650
WESTERN LIVESTOCK EXPRESS)	
Respondent)	
AND)	
)	
NATIONAL AMERICAN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Kenneth S. Johnson on December 12, 1997. The Appeals Board heard oral argument April 15, 1998.

APPEARANCES

Claimant appeared pro se. Rex W. Henoch of Lenexa, Kansas, appeared on behalf of the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Although it appears from claimant's application for review that he does agree with some of the findings by the Administrative Law Judge, it is not entirely clear which claimant disputes. The Board has, therefore, considered all issues decided by the Administrative Law Judge. Those issues are as follows:

1. What was claimant's average weekly wage?
2. What is the nature and extent of claimant's disability, if any?

3. Is respondent liable for additional outstanding medical bills incurred by the claimant?
4. Is respondent responsible for temporary total disability and medical expenses associated with claimant's neck injury?
5. Is claimant entitled to reimbursement for unauthorized medical expenses?
6. Is claimant entitled to future medical expenses?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board finds and concludes the Award should be modified. The ALJ awarded benefits for a 4 percent general body disability for injury to the right shoulder only. The Board agrees claimant has proven injury only to the shoulder but finds claimant is entitled to a work disability for the shoulder injury. The Board also concludes as follows: (1) claimant's average weekly wage is \$439.68; (2) respondent is not responsible for additional past medical expenses; (3) respondent is not responsible for medical expenses or temporary total disability associated with the neck injury; (4) claimant is entitled to be reimbursed for unauthorized medical expenses; and, (5) claimant is entitled to future medical expenses for treatment to the shoulder upon proper application to and approval by the Director.

Findings of Fact

1. Claimant was injured on March 8, 1991, while loading cattle. As he was attempting to close a gate, one of the cattle came through and knocked him into other gates.
2. Claimant contends he suffered numerous injuries, including injury to his right shoulder, neck, right elbow, low back, left hip, right hand, esophagus, and intestines. Claimant related to this injury problems with breathing, swallowing, and talking. He also claims headaches, blurred vision, and nausea.
3. Dr. Myron J. Zeller was the initial authorized treating physician. Dr. Zeller treated claimant from March 8, 1991, through March 28, 1991. At the initial examination on March 8, 1991, claimant advised Dr. Zeller that the gate jerked his right arm back and he complained of pain in his right upper arm with numbness in his right fingers. Dr. Zeller testified that his notes for the initial exam on March 8, 1991, contain no reference to neck pain or discomfort. On the second visit with Dr. Zeller, March 21, 1991, claimant complained of pain in his right shoulder and right upper back. Dr. Zeller acknowledged that the numbness in the fingers and the pain in the scapular and trapezius areas could be consistent with nerve root irritation of the neck. But Dr. Zeller thought the finger numbness was most likely from nerve root irritation in the brachial plexus. Dr. Zeller's records contain

no reference to trouble swallowing or breathing and no mention of headaches, ear problems or nausea. As of March 28, 1991, Dr. Zeller diagnosed strain of the back and right shoulder with possible malingering and referred claimant to Dr. John H. Gilbert, an orthopedic physician.

4. Dr. Gilbert first saw claimant April 18, 1991. Dr. Gilbert diagnosed rotator cuff tear and performed surgery for the tear on May 28, 1991. Dr. Gilbert prescribed physical therapy and on January 1, 1992, released claimant to full duty. He rated the impairment as 10 percent to the body as a whole and recommended claimant not lift more than 50 pounds or do work requiring overhead or repetitive movements with his right upper extremity. Claimant continued to complain of pain and weakness in his shoulder. Dr. Gilbert acknowledged it was in the realm of medical possibility that claimant's problems came, at least in part, from a cervical disc herniation. Dr. Gilbert did not believe this possibility reached to the level of medical probability. Dr. Gilbert referred claimant to Dr. Gregg M. Snyder.

5. Dr. Snyder performed a cervical discectomy on June 30, 1993. Dr. Snyder did not testify and respondent objected to the offer to introduce certain of Dr. Snyder's records made at the deposition of Dr. Zeller.

6. Dr. C. Reiff Brown examined claimant at the request of claimant's counsel. Dr. Brown first saw claimant April 8, 1992, after the rotator cuff surgery by Dr. Gilbert, but before the neck surgery by Dr. Snyder. Dr. Brown testified claimant told him about the injury to the shoulder but did not mention injury to the neck. Dr. Brown provided an impairment rating of 14 percent to the right upper extremity which he converted to 8 percent of the body as a whole. He recommended claimant avoid lifting above shoulder level on an occasional basis and avoid repeated use of the arm for work above shoulder level. He also advised claimant not to lift more than 50 pounds from waist to chest and shoulder and only occasionally push/pull at waist level and above. Dr. Brown ordered an EMG because of the complaints of radicular pain and numbness. The results were normal.

7. Dr. Blake C. Veenis, who specializes in physical medicine and rehabilitation, first saw claimant October 7, 1993, upon referral from Dr. Snyder. Dr. Veenis examined claimant's cervical spine and the right upper extremity. He found some decrease of range of motion of the cervical spine and tenderness over certain regions of the spinous processes. Dr. Veenis testified that problems he found would be consistent with the accident claimant described. But Dr. Veenis did not express any opinion as to the cause of claimant's problems. Dr. Veenis ordered a functional capacity evaluation. He concluded claimant could not continue to do the job he was doing at the time of the accident. He rated the functional impairment as 19 percent for the cervical spine and 5 percent to the body for the right shoulder, for a total of 23 percent impairment to the body as a whole. As restrictions, he recommended claimant not lift and carry more than 20 pounds occasionally, 10 pounds frequently, and a negligible amount constantly with the right upper extremity; claimant should sit no more than two hours at a time; claimant should do no prolonged

below-shoulder reaching more than intermittently; claimant should limit manipulation with the right hand; and, claimant should not climb, balance, stoop, squat, or kneel more than occasionally.

8. Dr. Brown saw claimant again July 25, 1996, after the surgery to claimant's neck. Dr. Brown reviewed records from Drs. Snyder, Veenis, Melhorn, and Anuti. Dr. Brown again evaluated claimant's impairment and concluded the shoulder problems had improved. He rated the right upper extremity as 7 percent, an improvement from the previous rating of 14 percent. Dr. Brown testified the improvement was primarily due to the absence of crepitus. Dr. Brown's report converts the 7 percent right upper extremity to 4 percent of the whole body. Dr. Brown also gave a rating for the cervical impairment of 24 percent to the body as a whole with 5 percent of this rating preexisting the onset of symptoms, leaving 19 percent based on the disc herniation, operation, and residuals. Dr. Brown rated the cervical injury but testified that, in his opinion, there was no relationship between the accident of March 8, 1991, and the neck impairment. He based this conclusion on the absence of neck complaints shown in the records of Drs. Zeller and Gilbert, as well as the normal EMG when Dr. Brown first saw claimant. Dr. Brown also testified that claimant presented a number of other complaints and findings which were not explainable.

9. Dr. William R. Kilgore, an internist specializing in gastroenterology, examined claimant on November 1, 1993, on referral from Dr. Snyder. He saw claimant for complaints of dysphagia (difficulty swallowing). Dr. Kilgore concluded the dysphagia was related to the cervical surgery done in 1993. Dr. Kilgore also diagnosed a hiatal hernia, diverticulosis, irritable bowel syndrome, and gastroesophageal reflux. Dr. Kilgore testified that the abdominal conditions were aggravated by the stress claimant was under and the stress came from the original injury. Neither Dr. Kilgore nor any other physician expressed an opinion about the extent of impairment from these conditions.

10. Claimant went to Dr. Zeller, the original treating physician, for a flight physical on October 4, 1994. Claimant passed the physical exam.

11. Eddie V. Pearson, the therapist in charge of claimant's physical therapy, testified that claimant complained of neck pain March 27, 1991. Dr. Brown was informed of this complaint but concluded it did not change his opinion that the neck problems were not related to the accident of March 8, 1991.

12. Respondent paid claimant 25 percent of the gross from each load. Wage information attached as respondent's Exhibit 1 to the hearing of July 15, 1997, shows what claimant earned for a 15-week period, only 14 of those weeks preceded the accident. The total earnings during the 14 weeks preceding the accident were \$5,708.61 or \$407.76 per week. Respondent also paid \$138.33 per month or \$31.92 per week for claimant's hospitalization insurance.

13. Approximately a week after the accident, respondent terminated claimant for not calling in and not showing up for work.

14. The Board finds the shoulder injury prevented claimant from returning to work driving a truck. Dr. Gilbert released claimant in January 1992, after the shoulder surgery, and claimant attempted to return to work truck driving but could not shift with his right arm and could not pass the driving test. Claimant testified he is no longer able to drive a truck.

15. Ms. Karen C. Terrill testified as to the effect claimant's injuries had on his ability to earn wages and obtain employment in the open labor market. Her opinions are based on the restrictions of Dr. Veenis. Dr. Veenis gave restrictions without identifying which are related to the neck injury and which to the shoulder injury. Ms. Terrill also conducted an evaluation for the vocational rehabilitation vendor and recommended claimant undergo a training program at the Garden City Community College.

16. Mr. Monty D. Longacre also testified about claimant's ability to earn wages and obtain employment. According to Mr. Longacre, claimant, based on Dr. Brown's restrictions for the right shoulder only, has a 24 percent loss of ability to engage in work in the open labor market taking into account claimant's education since the accident and has an 18 percent loss of ability to earn wages.

Conclusions of Law

1. For an employee paid on the basis of output, the base average weekly wage is the total earned during the number of weeks employed up to a maximum of 26 weeks divided by the number of weeks worked up to the maximum of 26 weeks. K.S.A. 1990 Supp. 44-511.

2. The weekly value of additional compensation is added to the base wage to arrive at the average weekly wage. K.S.A. 1990 Supp. 44-511.

3. Claimant's average weekly wage is \$439.68. Although claimant testified to a higher amount, the Board finds the record introduced to be the most reliable.

4. For an injury on March 8, 1991, before changes made in 1993, disability was defined by K.S.A. 1990 Supp. 44-510e in terms of loss in ability to earn wages and loss of ability to work in the open labor market:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent

of permanent partial general disability shall not be less than the percentage of functional impairment.

5. The Board finds claimant has failed to meet his burden of proving the neck injury arose out of and in the course of employment. None of the testifying physicians testified that the neck problems were caused by the accident at work. Drs. Zeller and Gilbert left room for that possibility but did not testify it was probable. Dr. Brown, on the other hand, testified that, in his opinion, the neck injury was not caused by the accident at work.

6. For the other medical conditions such as the problems breathing, swallowing, esophageal reflux, headaches, blurred vision, and nausea, addressed primarily in the testimony of Dr. Kilgore, claimant has not provided evidence of the extent of impairment or evidence of work restrictions attributable to those conditions.

7. The Board finds claimant has met his burden and has proven only a shoulder injury arising out of and in the course of his employment. Claimant has failed to meet his burden to prove other injuries or medical conditions were from accidental injury arising out of and in the course of employment.

8. The Board finds claimant is entitled to a work disability as a result of the shoulder injury. Although claimant was terminated for cause, not calling in and not showing up for work, not because of the shoulder injury, the Board has found the shoulder injury would have prevented claimant from returning to work driving a truck. Nothing in the record indicates claimant either did earn or was able to earn a comparable wage. K.S.A. 1990 Supp. 44-510e.

9. The Board finds claimant has a 21 percent work disability based on a 24 percent loss of ability to obtain and retain work in the open labor market and an 18 percent loss of ability to earn a comparable wage. The Board has given equal weight to the wage and labor market factors and has relied on opinions expressed by Mr. Longacre.

10. The Board finds claimant is not entitled to have any additional medical expenses paid as claimant has not proven there are unpaid bills for the shoulder injury.

11. The Board finds claimant is not entitled to receive payment for temporary total disability benefits attributable to the neck, or any other injury other than the shoulder, and to the extent respondent has paid such temporary total disability it represents an overpayment.

12. Claimant is also not entitled to have respondent pay the cost of medical treatment for the neck, or any other injury other than the shoulder, and to the extent respondent has already paid such medical expenses may seek reimbursement for those expenses by application to the Director.

13. Claimant is entitled to unauthorized medical expenses up to the statutory maximum of \$350.

14. Claimant is entitled to future medical expenses for the treatment of the shoulder injury upon proper application to and approval by the Director.

15. The Board affirms the conclusion by the ALJ that attorney fees cannot be awarded absent the attorney fee contracts. A hearing may be held before the ALJ on this issue if necessary. The Board finds that there is no valid lien on the benefits payable under this award.

16. The Board finds that evidence offered by claimant after the Award, as attachments to the pleading filed on appeal, may not be considered as the Board's consideration is limited to the evidence presented to the ALJ.

17. Reports of Dr. Snyder, offered at Dr. Zeller's deposition, are not admissible and were not considered by the Board. K.S.A. 44-519.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the December 12, 1997 Award entered by Administrative Law Judge Kenneth S. Johnson should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joe Rome, and against the respondent, Western Livestock Express, and its insurance carrier, National American Insurance Company, for an accidental injury which occurred March 8, 1991, and based upon an average weekly wage of \$439.68, for 98 weeks of temporary total disability compensation at the rate of \$278 per week or \$27,244, followed by 317 weeks at the rate of \$61.56 per week or \$19,514.52 for a 21% permanent partial disability, making a total award of \$46,758.52.

As of May 29, 1998, there is due and owing claimant 98 weeks of temporary total disability compensation at the rate of \$278 per week or \$27,244, followed by 279 weeks of permanent partial disability compensation at the rate of \$61.56 per week in the sum of \$17,175.24, for a total of \$44,419.24 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$2339.28 is to be paid for 38 weeks at the rate of \$61.56 per week, until fully paid or further order of the Director.

The Appeals Board approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joe Rome, Holcomb, KS
Rex W. Henoch, Lenexa, KS
Office of Administrative Law Judge, Garden City, KS
Philip S. Harness, Director